Zaliah bt Zakaria v Standard Chartered Bank Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D3–22–1628 OF 2005
NALLINI PATHMANATHAN JC
13 FEBRUARY 2009

Civil Procedure — Amendment — Statement of claim — Amendment after expiry of limitation period — Principles applicable — Whether proposed amendments introduced new cause of action — Amendments to clarify and provide further details allowed — Whether amendment to add words 'fraudulently' and 'negligently' allowed — Whether facts pleaded supported allegation of fraud — Whether original claim and proposed amendment on negligence arising out of same facts

The appellant's ('Zaliah's') original claim against the defendant was for the sum of approximately RM15m, which loss she claimed, arose from the fact that the defendant had allegedly wrongly, illegally and without her authorisation debited large sums of monies from her various accounts and deposits with the defendant. Zaliah applied for leave to make certain amendments to the statement of claim: (i) at para 3, she sought to particularise the details of all the accounts she held with the defendant at its Butterworth branch; (ii) at para 4, Zaliah sought to add the words 'fraudulently' and 'negligently' to the original paragraph; (iii) the original para 5 was proposed to be deleted. It contained particulars of unlawful withdrawals. It was proposed to be replaced instead with the claim that Zaliah's accounts had been debited in total in the sum of RM26m; and (iv) in the reliefs claimed at para 12, Zaliah sought to expand on her original prayer for a full disclosure on all accounts held by the defendant in her name. The application to amend was made approximately two and a half years after the original claim was filed. The issues which arose for determination were: (i) whether the proposed amendments introduced a new cause of action; (ii) whether any applicable limitation period had expired as of the date of the hearing of these proposed amendments; and (iii) whether the new cause/s of action arose out of the same or substantially the same facts as a cause of action already pleaded. Zaliah appealed against the decision of the learned senior assistant registrar who refused the leave to amend.

Held, allowing the appeal in part:

(1) The amendments proposed to be made to para 3 of the statement of

claim did not have the effect of adding any new cause of action to Zaliah's claim. Instead it served to clarify and detail the numerous accounts which Zaliah claimed she had with SCB at the time. Accordingly leave was granted for the amendments in para 3 (see para 17).

(2) In the original pleading there was no requirement for Zaliah to prove intentional wrongdoing on the part of the defendant in order to prove her claim. In the proposed new amendment to para 4 whereby 'fraud' was sought to be introduced, it would be material for Zaliah to prove an element of intentional wrongdoing. The proposed amendment to include fraud had the effect of seeking to introduce a new cause of action. On the assumption that the addition of a new cause of action in fraud was made after the relevant period of limitation had expired, the court found that none of the facts alleged were consistent with, or supported an allegation of fraud. As such, leave to amend to include the allegation and particulars of fraud in para 4 was refused (see paras 22, 23 & 26).

(3) As for the proposed amendments in para 4 relating to negligence, any applicable period of limitation had expired. However, the effect of the amendment was not to introduce any new plea but to explain or expand within permitted limits the case already pleaded by Zaliah. Anyhow, the original claim and the proposed amendment relating to negligence arose out of the same facts. Therefore, the proposed amendment relating to a new cause of action in negligence could be allowed (see paras 27, 28 & 30); *Skrine & Co v MBf Capital Bhd* [1998] 3 MLJ 671 referred.

(4) The amendments in para 12 were allowed since the amendments amounted to a particularisation of the relief originally sought. It was an expansion of the original relief claimed. Paragraph 12 also comprised consequential relief arising from the addition of the new cause of action in negligence as well as a computation of the total loss allegedly suffered by the appellant (see para 35).

[Bahasa Malaysia summary

Tuntutan asal perayu ('Zaliah') terhadap defendan adalah untuk sejumlah lebih kurang RM15 juta, yang merupakan kerugian yang dituntut olehnya, berbangkit daripada fakta bahawa defendan dikatakan telah secara salah, menyalahi undang-undang dan tanpa pemberian kuasa kepadanya mendebitkan sejumlah besar wang daripada pelbagai akaunnya dan mendepositnya dengan defendan. Zaliah telah memohon kebenaran untuk membuat pindaan-pindaan tertentu kepada penyataan tuntutan itu: (i) di perenggan 3, dia memohon agar diperincikan butiran kesemua akaun yang dipegangnya dengan defendan di cawangan Butterworth; (ii) di perenggan 4,

A Zaliah memohon ditambah perkataan-perkataan 'fraudulently' dan 'negligently' kepada perenggan asal; (iii) perenggan 5 yang asal dicadangkan agar dipotong. Ia mengandungi butiran pengeluaran-pengeluaran yang menyalahi undang-undang. Ia dicadangkan agar digantikan dengan tuntutan bahawa akaun-akaun Zaliah telah didebitkan untuk jumlah seluruhnya
B RM26 juta; dan (iv) dalam relief-relief yang dituntut di perenggan 12, Zaliah memohon agar dapat mengembangkan permohonan asalnya untuk pendedahan penuh kesemua akaun yang dipegang oleh defendan atas namanya. Permohonan untuk pindaan telah dibuat lebih kurang dua setengah tahun selepas tuntutan asal difailkan. Isu-isu berbangkit yang perlu
C ditentukan adalah: (i) sama ada pindaan-pindaan yang dicadangkan itu membentuk kausa tindakan baru; (ii) sama ada apa-apa tempoh had masa yang terpakai telah luput sejak tarikh perbicaraan pindaan-pindaan yang dicadangkan tersebut; dan (iii) sama ada kausa tindakan baru berbangkit daripada fakta yang sama atau sebahagian besar daripadanya sebagai kausa
D tindakan yang telahpun dirayukan. Zaliah telah merayu terhadap keputusan penolong kanan pendaftar yang enggan membenarkan pindaan.

E **Diputuskan**, membenarkan sebahagian rayuan:

(1) Pindaan-pindaan yang dicadangkan untuk dibuat kepada perenggan 3 penyataan tuntutan tidak mempunyai kesan menambahkan apa-apa kausa tindakan baru kepada tuntutan Zaliah. Sebaliknya ia digunakan untuk menjelaskan dan memperincikan pelbagai akaun-akaun dengan
F SCB yang didakwa oleh Zaliah dipunyainya pada masa itu. Sewajarnya kebenaran untuk membuat pindaan-pindaan tersebut kepada perenggan 3 dibenarkan (lihat perenggan 17).

(2) Dalam pliding asal tiada keperluan untuk Zaliah membuktikan
G kesalahan yang disengajakan di pihak defendan bagi tujuan membuktikan tuntutannya. Dalam cadangan pindaan baru kepada perenggan 4 di mana 'fraud' dipohon diperkenalkan, adalah penting untuk Zaliah membuktikan elemen kesalahan yang disengajakan. Cadangan pindaan untuk memasukkan fraud mempunyai kesan
H memperkenalkan kausa tindakan baru. Atas andaian bahawa tambahan kausa tindakan baru dalam fraud dibuat selepas tempoh had masa telah luput, mahkamah mendapati bahawa tiada langsung fakta yang dikatakan itu adalah konsisten, atau disokong dengan pengataan fraud. Oleh itu, kebenaran untuk membuat pindaan agar dimasukkan
I pengataan dan butiran fraud dalam perenggan 4 ditolak (lihat perenggan 22, 23 & 26).

(3) Berhubung cadangan pindaan-pindaan dalam perenggan 4 berkaitan kecuaian, apa-apa tempoh had masa telahpun luput. Walau bagaimanapun, kesan pindaan itu bukanlah untuk memperkenalkan

apa-apa pli baru tetapi untuk menjelaskan atau mengembangkan dalam batasan yang dibenarkan kes yang telahpun diplidkan oleh Zaliah. Meskipun begitu, tuntutan asal dan cadangan pindaan berkaitan kecuaian timbul daripada fakta-fakta yang sama. Oleh itu, cadangan pindaan berkaitan kausa tindakan baru dalam kecuaian boleh dibenarkan (lihat perenggan 27, 28 & 30); S*krine & Co v MBf Capital Bhd* [1998] 3 MLJ 671 dirujuk.

(4) Pindaan-pindaan dalam perenggan 12 dibenarkan memandangkan pindaan-pindaan tersebut membentuk pemerincian relief yang dipohon pada asalnya. Ia merupakan pengembangan relief asal yang dituntut. Perenggan 12 juga mengandungi relief penting yang timbul daripada tambahan kausa tindakan baru dalam kecuaian dan juga pengiraan seluruh kerugian yang dialami oleh perayu (lihat perenggan 35).]

Notes

For cases on statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 570–587.

Cases referred to

Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230, SC (folld)
Ketteman & Ors v Hansel Properties Ltd & Ors [1987] AC 189, HL (folld)
Letang v Cooper [1964] 2 All ER 929, CA (refd)
Paragon Finance plc v DB Thakerar & Co (a firm) [1999] 1 All ER 400, CA (folld)
Skrine & Co v MBf Capital [1998] 3 MLJ 649, CA (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Contracts Act 1950 s 17
Rules of the High Court 1980 O 20 r 5, 5(2), (5)

Darshan Singh (Darshan, Syed, Amarjit & Partners) for the plaintiff.

Jack Yow (Shearn Delamore & Co) for the defendant.

Nallini Pathmanathan JC:

[1] This is an appeal by the appellant ('Zaliah') against the decision of the learned senior assistant registrar refusing Zaliah leave to amend her statement of claim.

SUMMARY OF ORIGINAL CLAIM

[2] In brief, Zaliah's original claim against the defendant, Standard

Chartered Bank Malaysia Bhd ('SCB') is for the sum of approximately RM15m, which loss she claims, arose from the fact that SCB had allegedly wrongly, illegally and without her authorisation, on the instructions of one Ng Chee Khoon, debited large sums of monies from her various accounts and deposits with SCB.

[3] The statement of claim alleges that these withdrawals had taken place sometime between January 2000 and April 2001 when Zaliah was abroad, as a consequence of the said Ng Chee Khoon presenting letters purporting to bear Zaliah's signature, authorising large withdrawals. Ng Chee Khoon was her lawyer at the material time. Apart from this, in her original claim, Zaliah also set out particulars of numerous two unauthorised withdrawals made from some of her accounts between March and September 2000. Zaliah's original claim was filed in November 2005.

THE PROPOSED AMENDMENTS

[4] Vide the present application, Zaliah seeks to amend the statement of claim in the following manner:

(i) At *para 3*, she seeks to particularise the details of all the accounts she held with the defendant at its Butterworth branch. As such, the proposed amendment provides details of her personal savings account, her joint savings account held with her daughter, twenty (20) retirement time fund ('RTF') accounts or deposits and their particulars, fifty three (53) flexi-time deposit accounts and the sum purportedly held in these deposits, as well as other flexi-time deposits, the particulars of which she claims she no longer has. When the total amount of monies in these accounts and deposits is added up, it amounts to RM26m. Zaliah has not particularised any dates in relation to these accounts and time deposits;

(ii) At *para 4*, Zaliah seeks to add the words 'fraudulently' and 'negligently' to the original paragraph. The net effect of these proposed additions is to allege fraud and negligence against SCB in addition to the original allegations of wrongful, illegal and unauthorised debiting on the part of SCB. In support of the proposed new allegations of fraud and negligence, Zaliah proposes to add particulars of such alleged fraud and negligence.

(iii) The original *para 5* is proposed to be deleted. It contained particulars of unlawful withdrawals between March and September 2000. It is proposed to be replaced instead with the claim that Zaliah's accounts have been debited in total in the sum of RM26m.

(iv) Finally in the reliefs claimed at *para 12*, Zaliah seeks to expand on her original prayer for a full disclosure on all accounts held by SCB in her name, by seeking orders for full accounts of all monies held by Zaliah in her various accounts. She also seeks a declaration that SCB account to Zaliah for the sum of RM26m, with interest, as well as damages.

[5] The application to amend the statement of claim was made in April 2008 approximately two and a half years after the original claim had been filed. In the interim, Zaliah had made a previous attempt to amend the statement of claim in 2006 but it had been refused by the registrar and an appeal on that decision had previously been withdrawn.

[6] In her affidavit in support of the application to amend, Zaliah explains that her failure to fully and accurately particularise her claim was because she found when she returned from Dubai that most of her property, valuables and other possessions which she had left in her several places of residence were missing or had been removed from her home. Zaliah annexed several police reports that had been made at the time, which claimed that a great many valuable possessions had been stolen from her. Zaliah went on to explain that as such, she was unable to accurately surmise or particularise her claim fully at the time of filing. She thus explained the delay in making these amendments.

[7] Zaliah also annexed a voluminous number of documents encompassing a considerable portion of her entire banking history with SCB as exhibits in support of her application. It is evident from a perusal of these documents that:

(a) Zaliah did indeed have accounts with SCB at the material time, ie between January 2000 and April 2001;

(b) The letters purporting to authorise withdrawals bearing Zaliah's signature which she alleges is a forgery are also annexed. They request that monies be forwarded to Ng Chee Khoon; they are undated;

(c) Zaliah has annexed copies of the flexi-time deposits particularised in para 3(e) as exhibits.

THE APPELLANT'S SUBMISSIONS

[8] In support of Zaliah's application for leave to amend the statement of claim, her counsel, Mr Shivdev and Tan Sri Darshan Singh maintained that in accordance with the principles set out in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd* [1983] 1 MLJ 213, the amendments sought:

(i) are bona fide;

(ii) would not cause prejudice to SCB that cannot be compensated in costs; and

(iii) do not turn the suit from one character into a suit of another and inconsistent character.

[9] It was contended that the amendments sought do not in fact introduce new pleas but merely explain or expand within permitted limits the case already pleaded previously (see *Skrine & Co v MBf Capital* [1998] 3 MLJ 649). Alternatively it was submitted that even if the proposed amendments had the effect of adding new causes of action in fraud and negligence to the claim, these amendments should be allowed in accordance with the provisions of O 20 r 5, in that the new causes of action arise out of the same facts or substantially the same facts as the causes of action already pleaded and in respect of which relief has already been claimed (see *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230).

[10] Finally it was submitted that no prejudice was occasioned to SCB that could not be compensated in costs.

THE RESPONDENT'S SUBMISSIONS

[11] Mr Rabindranathan and Mr Yow for SCB strenuously opposed the application for amendment in its entirety submitting, inter alia, that:

(i) The proposed amendments sought to introduce new causes of action, particularly fraud, which by virtue of O 20 r 5 could only be allowed if it arose out of the same facts or substantially the same facts. It was contended that a case of fraud or dishonesty on the part of SCB was not evident in the original pleadings and could not simply be imputed to SCB without more, particularly where the allegations of fraud in the original pleading had been leveled against a third party. In short it was contended that an allegation of fraud or dishonesty on the part of SCB was very different from an allegation of breach of mandate or wrongful debiting, and it could not be said in those circumstances that the new cause of action in fraud was based on the same facts or substantially the same facts (see *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400).

[12] It was next submitted that the particulars pleaded were insufficient to ascribe fraud to SCB and inadequate to found a cause of action in fraud against the bank. There were no particulars to the effect that SCB was aware

of, or participated in the preparation of the 'fraudulent' letters purporting to authorise withdrawals from Zaliah's account.

[13] With respect to the proposed amendment to add negligence, counsel submitted that there were insufficient particulars of the relevant accounts involved and no dates given of the alleged wrongful debiting. These were facts which Zaliah could ascertain from statements in her possession but which she had failed to particularise. Additionally it was contended that SCB was unable to assess whether the claims in negligence were time-barred as the dates of the withdrawals had not been specified. However in relation to the deposit accounts, counsel maintained that SCB would be deprived of the defence of limitation.

[14] Finally it was contended that the amendments were sought after considerable delay and that the supporting affidavit filed by Zaliah was inadequate in that it failed to specify the new facts which had been discovered and their relevance to the claim. The mere placement of a voluminous quantity of documents without explaining them in the affidavit was inadequate. As a consequence it was contended, SCB would suffer prejudice if the amendments were allowed, in that the claim would be transformed after seven to eight years from a breach of mandate to one of fraud, which prejudice could not be compensated in costs.

THE ISSUES

[15] The issues that arise in respect of the proposed amendments are:

(i) whether the proposed amendments introduce a new cause of action;

(ii) whether any applicable limitation period has expired as of the date of the hearing of these proposed amendments; and

(iii) whether the new cause/s of action arises out of the same or substantially the same facts as a cause of action already pleaded.

[16] I propose to deal with the amendments outlined above under the following categories:

(a) amendments which do not introduce a new cause of action; and

(b) an amendment which introduce a new cause of action after the expiry of the limitation period but which the appellant contends arises out of the same or substantially the same facts.

Category (a): Amendments which do not introduce a new cause of action

[17] The amendments proposed to be made to para 3 of the statement of

claim amount to a particularisation by Zaliah of the accounts she maintains she held with SCB's Butterworth branch at the material time. The details of the various accounts held (as outlined above) are set out in paras (a) to (f). Such particularisation does not have the effect of adding any new cause of action to Zaliah's claim. Instead it serves to clarify and detail the numerous accounts which Zaliah claims she had with SCB at the time. Accordingly leave to amend the statement of claim to allow the amendments in para 3 should be granted.

Category (b): Amendments which introduce a new cause of action but which the appellants contend arise out of the same or substantially the same facts — the amendments relating to fraud

[18] In para 4 of the statement of claim, Zaliah proposes to add allegations of both fraud and negligence against SCB. The allegation of fraud amounts to a proposal to introduce a new cause of action. It is not entirely clear whether any applicable limitation period has expired, as the precise date of discovery of the alleged 'fraud' is not apparent. Therefore the date to which the limitation period is postponed is similarly not clear.

[19] In order to assess the effect of the proposed new cause of action it is necessary to consider the nature of the original claim first. The original para 4 contends that SCB wrongly, illegally and without due authorisation debited Zaliah's accounts on the instructions of one Ng Chee Khoon. It is therefore evident that in order to establish this cause of action it is not necessary to prove any element of 'intent' on the part of SCB. In short, the original cause of action, while leveling wrongdoing at SCB, does not ascribe any element of *intentional wrongdoing* on its part. There is no requirement to prove any element of willful or intentional wrongdoing on the part of SCB for Zaliah to succeed in her original claim, as 'intent' does not comprise an element of the cause of action in the original claim.

[20] However the proposed amendment in para 4 vis-a-vis fraud seeks to introduce an element of intentional wrongdoing which was not present in the original claim. Fraud is a cause of action in which it is material to prove intent (see s 17 of the Contracts Act 1950). In *Paragon Finance v DB Thakerar & Co*, Millet LJ put it thus when deliberating on an application to amend a statement of claim to introduce, inter alia, fraud:

> … In my judgment, it is incontrovertible that an amendment to make a new allegation of intentional wrongdoing by pleading fraud, conspiracy to defraud, fraudulent breach of trust or intentional breach of fiduciary duty where previously no intentional wrongdoing has been alleged constitutes the introduction of a new cause of action paras 10A and 15A(2) allege intentional breach of fiduciary duty. Breach of fiduciary duty was already pleaded but in terms which did not involve

any conscious impropriety. The appellants submit that the mere addition of an allegation of intent does not amount to a new cause of action. In my judgment this is contrary to the authorities already cited, which show that intentional and unintentional wrongdoing give rise to distinct causes of action.

[21] Earlier on in his judgment, the learned judge had referred to the case of *Letang v Cooper* [1964] 2 All ER 929 at p 934, more particularly the definition offered by Diplock LJ of a cause of action:

> … A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.
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> The question in *Letang v Cooper* was whether a claim for damages for personal injuries sustained as a result of the defendant's negligence was a claim for 'damages for negligence' within the meaning of s 2(1) of the Limitation Act 1939 as amended by s 2 of the Law Reform (Limitation of Actions) Act 1954 eventhough the claim was expressly pleaded in trespass. Diplock LJ held that where actual damage in the form of personal injuries has been sustained by the appellant every factual situation which falls within the description of 'trespass to the person' is, *where the trespass is unintentional*, equally aptly described as negligence' (emphasis added). His reasoning was (i) trespass to the person may be intentional or unintentional; (ii) intent is therefore not one of the facts which is material to be proved to constitute the cause of action; (iii) accordingly unintentional trespass may be equally aptly described as negligence.
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> But it is important to observe what Diplock LJ was *not* saying. He was *not* saying that trespass and negligence are the same cause of action or that intentional trespass could equally aptly be described as negligence, or that a cause of action in which it was material to prove intent could equally well be described by the name of a cause of action in which it was not This would make any distinction between different causes of action illusory and destroy the practical utility of the same concept …

[22] In the instant case, in the original pleading there is no requirement for Zaliah to prove intentional wrongdoing on the part of SCB in order to prove her claim. In the proposed new amendment to para 4 whereby 'fraud' is sought to be introduced, it will be material for Zaliah to prove an element of intentional wrongdoing. As a consequence it cannot be concluded that the amendment relating to fraud does not seek to introduce a new cause of action, but is only an expansion of an existing plea within permitted limits. The proposed amendment to include fraud has the effect of seeking to introduce a new cause of action.

[23] On the assumption that the addition of a new cause of action in fraud on the facts of this case is made after any relevant period of limitation has expired, the issue that then falls for consideration is whether, in accordance with O 20 r 5 sub-r 5, the new cause of action arises out of the same facts

A or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

B **[24]** While the proposed amendments do indeed reveal no further new facts to support the proposed plea of fraud, they are in themselves insufficient to attribute any element of intentional wrongdoing or impropriety on the part of SCB. In *Paragon Finance* Millet LJ stated as follows with regards to an allegation of fraud:

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> … It is well established that fraud must be distinctly alleged and as distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. An allegation that the defendant 'knew or ought to have known' is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud even if the court is satisfied that there was actual
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> D knowledge. An allegation that the defendant had actual knowledge of the existence of a fraud perpetrated by other and failed to disclose the fact to the victim is consistent with an inadvertent failure to make disclosure and is not a charge of fraud. It will not support a finding of fraud even if the court is satisfied that the failure to disclose was deliberate and dishonest. Where it is expressly alleged that
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> E such failure was negligent and in breach of a contractual obligation of disclosure, but not that it was deliberate and dishonest, there is no room for treating it as an allegation of fraud.

F **[25]** I respectfully agree and adopt the reasoning above. In the instant case none of the facts alleged are consistent with, or support an allegation of fraud. On the contrary, the facts pleaded do not make any allegations of deliberate dishonesty as envisaged by s 17 of the Contracts Act 1950. A claim based on allegations of unauthorised debiting or a claim for breach of a mandate,

G which involves unintentional wrongdoing, cannot be said to arise from substantially the same facts as a claim based on allegations of fraud and dishonesty, which require as a material component, an element of intentional wrongdoing. There is a sharp dividing line which separates the latter category of cases relating to fraud and dishonesty, from those claiming unintentional

H wrongdoing. It therefore follows that the same or substantially the same facts cannot support both a claim for wrongful or unauthorised debiting, as well as fraud. The former envisages a claim based on unintentional wrongdoing while the latter envisages a claim which requires as a material component, an element of intentional wrongdoing.

I **[26]** As such, the facts as pleaded while supporting a claim of a breach of mandate, cannot and do not support a cause of action in fraud, and it follows that leave to amend to include the allegation and particulars of fraud in para 4 should be refused. As stated by Millet LJ:

> … As we have seen, a cause of action is defined by its factual ingredients, not by the name ascribed to it. As Juliet observed of the rose, its essential character is not dependent on the name by which it is called.

In the absence of facts warranting a claim based on fraud and dishonesty, leave to amend should not be granted.

The proposed amendment relating to negligence — Amendments which introduce a new cause of action after the expiry of the limitation period but which the appellant contends arises out of the same or substantially the same facts

[27] The proposed amendments in para 4 relating to negligence fall within this category. As of the date of the hearing of this application, any applicable period of limitation current at the date of issue of the writ, has expired. This is because the dates of the breaches alleged against SCB arise at any time between January 2000 and April 2001 (see para 4 of the statement of claim). Accordingly O 20 r 5 sub-r (2) and (5) prescribe the criteria to be satisfied when deciding on a proposed amendment of this nature. The overriding consideration in sub-r 2 is that the court may grant leave if it thinks it just to do so. And sub-r 5 prescribes that notwithstanding that the effect of the proposed amendment is to add a new cause of action, leave may be granted if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action.

[28] Does the proposed amendment relating to negligence serve to add a new cause of action? It can be said that the effect of the amendment is not to introduce any new plea but to explain or expand within permitted limits the case already pleaded by Zaliah. On this basis, respectfully relying upon the approach taken by Gopal Sri Ram JCA in *Skrine & Co v MBf Capital Bhd* [1998] 3 MLJ 671, I can do no better than reproduce His Lordship's adoption of the speeches of Lord Brandon in *Ketteman & Ors v Hansel Properties Ltd & Ors* [1987] AC 189:

> … With regard to the principles on which his discretion to allow or refuse the applications to amend should be exercised, the judge referred to the notes to RSC O 20 r 5, in The Supreme Court Practice 1982 and to the authorities there cited. The effect of these authorities can, I think, be summarised in the following four propositions. First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they has been made necessary by the honest fault or mistake of the party applying for leave to make them; it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however

A late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly there is no injustice to the other party if he can be compensated by appropriate orders as to costs …

B **[29]** In the instant case, the plea of negligence and particulars sought to be incorporated, appear to expand and explain the case already pleaded. SCB will not be prejudiced in any manner that cannot be compensated by appropriate orders as to costs. In the circumstances the justice of the case requires that the amendment relating to negligence be allowed.

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[30] Even if I am wrong, and the proposed amendment does indeed introduce a new cause of action, sub-r 5 allows such a new cause of action to be introduced provided it arises out of the same or substantially the same facts as the cause of action already pleaded. It is evident from a perusal of the

D original claim and the proposed amendment relating to negligence that the amendment arises out of the same facts. The proposed amendment serves to clarify and particularise Zaliah's claim with greater precision and detail. This benefits both Zaliah and SCB in that it assists in putting into perspective the true nature of the dispute or controversy between the parties.

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[31] Counsel for SCB contended that the latter portion of sub-r 5 in O 20 r 5, relating to 'relief' ought to be read such that an amendment could only be allowed if no new relief was claimed. In the instant case, in so contending

F reliance was placed on the dissenting judgment of Seah SCJ in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 where His Lordship held:

> … In short, the court may allow a new claim to be added only if the conditions specified in sub-r (5) are satisfied and subject further to the overriding sub-r (2) thereof. The conditions referred to in sub-r (5) are the following:
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> (a) In the case of a claim involving a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as are already in issue on any claim previously made in the original action; and
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> (b) That relief has already been claimed in the action by the party applying for leave to amend.
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> The question I have to consider is whether the respondent had brought his case within this ambit. Under the proposed amendments the respondent attempted to introduce two new causes of action based on — (i) the tort of conversion
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> I (para 8) and (ii) for moneys had and received by the appellant to the respondent's use (see para 9).
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> Consequential to these amendments the respondent will also amend the prayer by adding damages and exemplary damages, new relief which had not been claimed in the original action but only came in after the amendment to the

> statement of claim … Although the respondent had complied with condition (a) but he had failed to satisfy condition (b) of sub-r (5). Since both the conditions specified in sub-r (5) had not been satisfied by the respondent the learned judge should have dismissed the application.

[32] In his dissenting judgment Seah SCJ held that a condition implicit in O 20 r 5 sub-r 5 is that an amendment would only be allowed under this provision if the relief sought had already been claimed in the original action. If new relief were sought which had not been claimed in the original statement of claim leave to amend should be refused because the said condition implicit in sub-r 5 had not been adhered to.

[33] For my part I would most respectfully adopt the majority decision in the same case by both Abdul Hamid Ag LP and Syed Agil Barakbah SCJ. Again I can do no better than with respect, rely on the construction of the said rule as expressed by Syed Agil Barakbah SCJ:

> … The provision of para (5) is clear and not ambiguous. It is therefore necessary to interpret the words in their plain and natural meaning in accord with the intention of the legislature, and should not however be extended beyond its natural and proper limit (see *Government of Malaysia v Mohamed Amin bin Hassan*). My reading of para (5) as emphasised is that it merely refers to a cause of action in the original pleading in which relief has already been claimed. It does not either expressly or by implication prevent any amendment by adding or substituting a new relief. In this particular case, to allow an amendment to only the cause of action without allowing a similar amendment to the new relief will not serve any purpose. A fortiori when the latter is incidental to the former. Relief means a remedy sought by an appellant in an action … Relief is part and parcel of a new cause of action and in fact ancillary to it. In my view it is just and proper for the judge in the court below to grant the respondents leave to amend the statement of claim after the expiration of the limitation period as provided in r 5 para (2) by allowing the addition of a new cause of action and also new reliefs that flow from it …

[34] It therefore follows that not only that the proposed amendment relating to a new cause of action in negligence should be allowed, but that any consequential relief arising therefrom should also be allowed. For the reasons outlined above, it is just that the amendment relating to negligence in para 4 be allowed, as it arises out of the same or substantially the same facts as those already pleaded.

Amendments relating to relief sought in para 12

[35] These amendments in para 12 are allowed for the following reasons:

(i) as explained by counsel for the appellant, the amendments in para 12

A sub-paras (d), (e) and (f) amount to a particularisation of the relief originally sought in para (c). It is an expansion of the original relief claimed; and

(ii) sub-paras (f), (g), (h) and (i) comprise consequential relief arising from the addition of the new cause of action in negligence as well as a computation of the total loss allegedly suffered by the appellant.

B

[36] In summary, I conclude that leave to amend para 3, that part of para 4 relating to negligence only, paras 5, 9 and 12 is granted, while leave to amend to para 4 in relation to the allegation of fraud is disallowed. Accordingly, the appeal is allowed in part as stated and the appellant is to bear the costs of the amendment.

C

Appeal allowed in part.

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Reported by Kanesh Sundrum

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